JACKSON'S MALAYA BERHAD v. PENANG PORT COMMISSION

[O.C.J. (Chang Min Tat J.) April 13, 1973]

[Penang — Civil Suit No. 115 of 1969]

Contract — Bailment — Whether implied term for limitation of liability — Subsidiary legislation — Port authority — Limitation of liability — Whether by-laws ultra vires — Penang Port Commission By-laws, 1957 — Penang Port Commission Ordinance, 1955.

Port Authority — Liability — Limitation.

The plaintiffs sued the defendant for breach of contract of bailment in respect of one carton of merchandise in the sum of $3,442.97. Loss of the carton was admitted by the defendant but it was argued that the defendant's liability was limited to $1,000, as provided in the Penang Port Commission By-laws.

Held: (1) there was no implied term in this case in regard to the limitation of liability;

(2) by-law 79 of the Penang Port Commission By-laws 1957 was *ultra vires* the powers given by the Penang Port Commission Ordinance, 1955 and was therefore void; the defendants were therefore liable for the full value of the articles lost.

Case referred to:-

(1) *Burnett* v. *British Waterways Board* [1972] 2 Lloyd's Rep. 222.

ACTION.

S. Thillaimuthu for the plaintiffs.

Lim Kean Siew and *Lim Peng Siew* for the defendant.

Chang Min Tat J.: In this action, the plaintiffs sued the defendant for damages for breach of contract of bailment in respect of one carton of merchandise, in the sum of $3,442.97¢. The plaintiffs were importers of the goods, which were brought to Penang by steamship. It was alleged that the defendant as warehouseman took delivery of two cartons into its godowns with an obligation to deliver the same on request to the plaintiffs upon the latter paying the usual rent for storage. In the events that happened, only one carton was delivered. In respect of the other carton, the plaintiffs alleged that it was still detained by the defendant.

The defence was a denial that the alleged missing carton was received. In the alternative, it contended that if it was responsible, the Commission's liability was limited to $1,000 by a by-law.

At the commencement of the hearing, both counsel found it possible to agree on the loss of the carton and on the valuation. The only issue was the amount of the liability. On this agreement, the defence began.

Only one witness was called. He was Lim Teik Chuan, traffic manager for the defendant. He averred that so far as he was aware, the undertaking of the defendant as warehouseman or wharfinger was carried out on the condition of the by-laws and that on this undertaking, the charges for handling and storage were fixed, irrespective of the intrinsic value of the goods. He averred that while it was possible for goods to be landed in Penang without resort to the facilities of the Penang Port Commission, dangerous drugs were by customs regulations required to be landed at the defendant's wharves. However, provided they were taken delivery of immediately after customs and other formalities had been complied with, the goods need not be stored in the defendant's godown.

The plaintiffs adduced no evidence on the nature of the goods concerned or on any other matters and relied on the questions of law raised on the pleadings and on the facts of the case. This case stands to be decided on the basis that the goods were not of a dangerous nature.

Very briefly, the plaintiffs contended that the limitation of liability was *ultra vires* the Ordinance, while the defendant argued that not only was the limitation not *ultra vires* but was necessary for the viability of the Commission. The limitation was moreover an implied term of the contract of bailment.

To my mind, with every respect, the question of viability is not arguable. It is possible and, indeed, elementary actuarial practice to fix the charges at a figure commensurate with the risk undertaken, and as a statutory body entrusted with the sole authority to run the port, the Penang Port Commission must necessarily so conduct its affairs in accordance with the ordinary requirement for "good rule and government." It must therefore consider the risks it undertakes and having regard to all the circumstances of its undertakings, particularly the risk of loss from pilferage, determine the proper rates to be paid on the declared values of the goods. No reason was advanced why this could not be done, or why this was not done. The only reason I could myself see, very much as a guess, is the degree of pilferage which would appear to be considerable, but in my view, that is a matter which is within the province of the Port Commission to tackle and to minimise. For myself, I am of the opinion that the fixed rate of charges without regard to the value of the goods received could not be justified by the possibility of loss.

On the question whether the limitation of liability was an implied term of the agreement, considered as suggested by learned counsel for the defendant purely as a matter of consensual agreement, notwithstanding its being *ultra vires* the Ordinance, if it should be so found, it ought, I think, to be realised that when as so often happens, it is not possible for a variety of reasons, some connected with clearance with customs, landing and import regulations, to remove the goods on landing or shortly afterwards, so as to avoid warehousing, it becomes necessary for the merchandise to be left with the defendant. In such circumstances, where it is the intention of the defendant to make the limitation on liability an implied term, the parties are obviously not negotiating on the basis of mutuality. The plaintiffs were not. They did not have any freedom of choice in this matter.

The case of *Burnett* v. *British Waterways Board*[1] is illuminating. In that case, the plaintiff was a lighterman, in a barge towed, in a train of barges, into a canal. A rope parted and injured the plaintiff. The defendants admitted liability but relied on a notice exempting them from liability in such circumstances. Waller J. held that the notice was apt to cover the situation of the case but since the plaintiff was not in a position of choice, the defence of *volenti non fit injuria* failed.

In my view, the defence of an implied term fails.

Now, the limitation of liability is provided in by-law 79 of the Penang Port Commission By-laws 1957 (published under Legal Notification (N.S.) 93 of 1957). This by-law has since been amended but the amendment, made in 1970, is of no consequence. The by-law applicable is in the form as unamended and in this form reads:

"The Commission shall not be responsible to a greater extent than $1,000 for loss of damage to any package of goods which exceeds in value $1,000 or which in total value in relation to the total cubic measurement exceeds $200 per cubic foot, unless, in respect of any package of goods not exceeding in value $2,000 written notice of the marks number contents and value thereof has been received and acknowledged in writing by the Traffic Manager prior to the delivery into the custody of the Commission. For each package special charges will be made."

This and other by-laws were made by the Commission in exercise of the powers conferred on it by section 66 of the Penang Port Commission Ordinance No. 56 of 1955 and approved by the Yang di-Pertuan Agong. Section 66 reads:

"66.(1) The Commission may make by-laws for —

(a) regulating, declaring and defining the wharves, docks, piers and places vested in the Commission or under its control, on and from which goods shall be landed from and shipped in vessels;

(b) regulating the manner in which and the conditions under which the loading and discharging of vessels shall be carried out, and for varying the positions of vessels loading and discharging;

(c) the safe and convenient use of the docks, wharves, piers, landing-places, warehouses, sheds and premises vested in the Commission or under its control and of any ferry service maintained by the Commission;

(d) regulating the reception, storage and removal of goods within and from the premises of the Commission, and for declaring the procedure to be followed for taking charge of goods which have been damaged before landing or are alleged to have been so damaged;

(e) settling the mode of payment of rates leviable under this Ordinance, and for facilitating their collection and preventing their evasion;

(f) keeping clean the basins, works and premises of the Commission and the waters adjacent thereto, and for preventing filth and rubbish being thrown or entering therein or thereon;

(g) the guidance of persons employed by it under this Ordinance; and

(h) otherwise carrying out the purposes of this Ordinance.

(2) The Commission shall make by-laws for regulating the conveyance loading and unloading of dangerous goods within the jurisdiction of the Commission and in particular for declaring or regulating all or any of the following matters within the said jurisdiction:

(a) determining the notice to be given by ships and boats conveying, loading or unloading dangerous goods within the said jurisdiction;

(b) regulating the navigation and place of berthing of such ships and boats;

(c) regulating the mode of stowing and keeping dangerous goods on board any such ship or boat;

(d) prohibiting or subjecting to conditions and restrictions the conveyance of any kind of dangerous goods with any other kind of dangerous goods or any articles or substances or in passenger ships, boats, trains or vehicles;

(e) prohibiting in cases where the loading or unloading of dangerous goods within the jurisdiction of the Commission appears to be specially dangerous to the public such loading or unloading, and fixing the places and times at which the dangerous goods are to be loaded or unloaded and the quantity to be loaded or unloaded or conveyed at one time or in one ship, boat or vehicle;

(f) regulating the mode of and the precautions to be observed in conveying or keeping dangerous goods and in the loading or unloading any ship, boat or vehicle conveying dangerous goods;

(g) fixing the times at which lights or fires are to be allowed or not allowed on board such ships or boats as before mentioned;

(h) generally for protecting whether by means similar to those above-mentioned or not persons and property from danger."

It will be readily seen (for which reason, section 66 is quoted *in toto)* that the only way it can be suggested that by-law No. 79 could be said to be authorised by the Ordinance is to apply the "*ejusdem generis*" rule to section 66(1)(h). I do not myself, with respect, consider this suggestion sound but for the moment I propose to accept it. However it was argued that section 66(1)(d) gave the Commission the powers to pass a by-law for limiting its liability. With respect, I do not agree. This sub-section, in my view, merely empowers it to regulate the procedure for the transhipment of goods and has no relevance to money matters.

In the present Ordinance, there is a whole chapter, Part VI, devoted to Limitation of Liability. Section 72 in this part refers to the limitation of the Commission's liability in certain cases of loss of or damage to goods. Section 73 is concerned with cases of loss of life or injury or damage to goods in the cases therein mentioned. Section 74 is the limitation section generally of liability in all other cases of damage to vessel or vessels and goods on board. Section 76 enacts that the limitation of liability shall relate to the whole of any losses and damages upon any one distinct occasion and section 77 provides for the consolidation of actions.

Expressio unius est exclusio alterius. On this principle of interpretation, I must necessarily hold that if it was the intention of Parliament to permit the Commission to limit its liability for loss of or damage to goods in its custody, such an intention would be expressed specifically in a section in this part of the Ordinance, and that since there is none, by-law 79 made under section 66 of the Ordinance in Part V, Duties and Powers of the Commission is, if purporting to limit its liability, *ultra vires* the Ordinance.

It seems to me that there is legislative support for my reading of this by-law. The duties of the Commission are by section 58 stated, *inter alia*, to be

"to maintain or provide for the maintenance of, adequate and efficient port services."

Section 59 confers on the Commission certain powers for the purpose of carrying out the duties imposed upon it by the previous section. Amongst these powers is the power in sub-section (k) to

"be insurers of goods in the custody of the Commission."

If the Commission accepts goods into its custody, as it must do, and fails to exercise its powers to be insurers, on a sound actuarial footing, of the goods in its custody or to exercise its powers adequately and properly, then, in the absence of statutory provisions and by-laws properly made, it must come under

the common-law liability for all damages occasioned as a reasonable consequence of its default or neglect.

I am consequently of opinion that there is no authority in the Penang Port Commission Ordinance permitting the Commission to restrict its liability for goods received into its custody and particularly it has no powers under section 66 to do so.

The claim therefore succeeds. There will be judgment for the plaintiffs in the sum of $3,442.07 and interest thereon at 6% from 3 May 1968 to judgment or payment whichever is the later. The plaintiffs will also have the costs of the action.

Judgment for the plaintiff.

Solicitors: *S. Thillainuthu & Phock Kin; Lim Huck Aik & Co.*

CHE DAH & ANOR. v. COMMISSIONER OF LAND TITLES (PENANG AND MALACCA) PENANG

[O.C.J. (Chang Min Tat J.) April 13, 1973]

[Penang — Civil Suit No. 300 of 1972]

Land Law — Land conveyed to settlor for life and thereafter to beneficiary — Conversion of land to Torrens system — Land registered in name of settlor "for life as trustee" — Death of settlor — Transfer by beneficiary — Application for registration rejected — Remedy — Appeal to the High Court — National Land Code (Penang & Malacca) Titles Act, 1963, ss. 66-69 — National Land Code, 1965, ss. 292, 298, 301, 302, 340, 417 and 418.

By a deed of gift made in 1963 one Aishah granted and conveyed a piece of land to hold the same for her daughter Che Dah in fee simple subject to her life interest. When land in Penang was converted to the Torrens Systems under the provisions of the National Land Code (Penang and Malacca Titles) Act, 1963 the name that appeared on the interim register was "Aishah binte Haji Yusoff for life as trustee". Aishah died in 1968 and in 1970 Che Dah (the first plaintiff) purported to transfer the land to the second plaintiff for valuable consideration. When the transfer was presented for registration, it was rejected on the ground that the transferor was not the registered proprietress. The plaintiffs brought an action under section 447 of the National Land Code for a declaration that the first plaintiff was the registered proprietress of the land and for an order that the transfer be registered.

Held: (1) the proper remedy for the plaintiff to pursue was to apply under section 417 of the National Land Code and the Rules of the Supreme Court to direct the Registrar to register her as the owner of the land upon her rights of a remainderman falling into possession;

(2) the action as instituted was misconceived and must be dismissed.

ACTION.

W. A. Goh (Miss) for the plaintiffs.

Abu Talib bin Othman (Legal Adviser, Penang) for the defendant.

Chang Min Tat J.: This action commenced by writ was by an order made on an application under section 447 of the National Land Code 1965 tried by motion in the writ. It concerned a piece of land and hereditaments known as Lot 140 situate in Mukim A in the South-West District of Penang.

The history of the land can be briefly stated as follows:

By a deed of conveyance date 29 October 1906, one Eusoof bin Ismail acquired the fee simple of the land in questtion subject to a mortgage. The mortgage which was made in November 1905 would appear to be outstanding but would be time-barred and nothing turns on it. Next by a deed of conveyance made on 10th March 1939 the said Eusoof bin Ismail conveyed the land to himself for life "as trustee' and thereafter to Aishah binte Haji Yusoff. Then, by a deed of gift made on 16th July 1963, in consideration of the natural love and affection which she had of her daughter, Che Dah binte Haji Sulaiman and in further consideration of the sum of $1 paid her by the said Che Dah, Aishah binte Haji Yusoff as beneficial owner, granted and conveyed, *inter alia*, the land to hold the same unto Che Dah binte Haji Sulaiman, the first applicant herein, in fee simple subject however to her life interest. It was recited therein that Eusoof bin Ismail had since died. Needless to say, all these conveyances were under the old English system of conveyancing as embodied in the Law of Property and Conveyancing Ordinance (S. S. Laws Cap. 118).

In the course of the conversion of the land system to the Torrens System under the provisions of the National Land Code (Penang and Malacca Titles) Act 1963, the name that appeared on the interim register was Aishah binte Haji Yusoff "for life as trustee".

Aishah died at the age of 70 on 16 May 1968.

By a transfer executed on 2 November 1970, the remainderman Che Dah binte Haji Sulaiman purported to convey the land to Chew Kooi Seng for valuable consideration. When presented for registration, it was rejected upon the grounds that the transferor was not the registered proprietress. More specifically, the reasons for the rejection were stated to be that the land was still registered in the name of Aishah and no action had yet been taken by the transferor to have herself registered as the proprietress of the land.

As a result, both the transferor and the transferee brought this action in court for—

1. a declaration that the transferor is the registered proprietress of the land,
2. an order that the transferor be registered in the interim register as the remainderman,
3. an order that the transfer of 2 November 1970 be registered,

and for all consequential orders and other reliefs. They regarded the refusal of the Commissioner to register the transfer as unreasonable. To anyone brought up in the old system of conveyancing, their attitude is, if I may say so with respect, not entirely unintelligible. In this previous system all that was necessary was a recital that the tenant for life had died, as in the deed of gift of 16 July 1963. The death could be ascertained by a requisition on title and after 30 years would be accepted as a fact without necessity for further proof. The death of the tenant for life meant that the fee simple passed in law and in fact to the remainderman without any or further action and the remainderman was